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In the Supreme Court of the United States

OCTOBER TERM, 1976

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ROBERT J. KOWALSKI AND NANCY A. KOWALSKI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes and regulation involved	2
Statement	2
Reasons for granting the writ	6
Conclusion	12
Appendix A	1A
Appendix B	38A
Appendix C	42A
Appendix D	43A

CITATIONS

Cases:

Commissioner v. *Glenshaw Glass Co.*, 348 U.S. 426	5, 8, 9, 10
Commissioner v. *Lo Bue*, 351 U.S. 243	9, 10
Commissioner v. *Smith*, 324 U.S. 177	9
Dole v. *Commissioner*, 43 T.C. 697, affirmed, 351 F.2d 308	11
Douglas v. *Willcuts*, 296 U.S. 1	8
Helvering v. *Clifford*, 309 U.S. 331	8
Helvering v. *Midland Mutual Life Ins. Co.*, 300 U.S. 216	8
Irwin v. *Gavit*, 268 U.S. 161	8
Koerner v. *United States*, 404 F. Supp. 1128, on appeal to C.A. 4, No. 76-1495, argued December 9, 1976	7
Old Colony Trust Co. v. *Commissioner*, 279 U.S. 716	8

Cases—Continued — Page

Saunders v. *Commissioner*, 215 F.2d 768, reversing 21 T.C. 630 — 6, 10

Smith v. *United States*, C.A. 5, No. 75-1609, decided December 13, 1976 — 7

United States v. *Barrett*, 321 F.2d 911 — 6, 7, 9

United States v. *Keeton*, 383 F.2d 429 — 6, 7

United States v. *Morelan*, 356 F.2d 199 — 6, 7

Wilson v. *United States*, 412 F.2d 694 — 6, 7, 11

Statutes and regulations:

Internal Revenue Code of 1954 as amended (26 U.S.C.):

Section 61(a) — 2, 5, 6, 8, 10, 43A

Section 119 — 2, 5, 6, 7, 10, 11, 43A

Section 120 — 11

Section 162(a)(2) — 5

Section 6214(a) — 4

Revenue Act of 1913, Section II(B), 38 Stat. 114, 167 — 8

Technical Amendments Act of 1958, Section 3, 72 Stat. 1606, 1607 — 11

Treasury Regulations 111, Section 29.22(a)-3 (1939 Code) — 10

Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.):

Section 1.119-1 — 2

Section 1.119-1(c)(2) — 11

Miscellaneous:

H.R. Rep. No. 775, 85th Cong., 1st Sess. (1957) — 11

S. Rep. No. 1622, 83d Cong., 2d Sess. (1954) — 10

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COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ROBERT J. KOWALSKI AND NANCY A. KOWALSKI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (App. A, *infra*, pp. 1A-37A) are reported at 65 T.C. 44. The opinion of the court of appeals (App. B, *infra*, pp. 38A-41A) is reported at 544 F. 2d 686.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, p. 42A) was entered on November 11, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether cash payments to state police troopers that are in addition to their salary and that are designated as meal allowances are includable in their gross income under Section 61(a) of the Internal Revenue Code of 1954, and not otherwise excludable from income under Section 119 of the Code, which excludes from an employee's gross income the value of meals provided to him by his employer if the meals are furnished on the employer's business premises.

STATUTES AND REGULATION INVOLVED

The relevant provisions of Sections 61(a) and 119 of the Internal Revenue Code of 1954 (26 U.S.C.) and of Treasury Regulations, Section 1.119-1 (26 C.F.R.) are set forth in Appendix D, *infra*, pp. 43A-47A.

STATEMENT

Respondent [1] is a state police trooper employed by the Division of State Police of the Department of Public Safety of the State of New Jersey. During 1970, respondent received a base salary of $8,739.38, and an additional amount of $1,697.54, designated as an allowance for meals.[2] All New Jersey State Police troopers are entitled to the same meal allowance regardless of their length of service (App. A, *infra*, pp. 2A, 4A and n. 2, 5A, 7A-8A).

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[1] References to "respondent" are to Robert J. Kowalski. Nancy A. Kowalski is a party solely because she filed a joint return with her husband for the year at issue.

[2] Although respondent was entitled to $1,704 in meal allowance money, he in fact received $1,697.54. The discrepancy is not relevant (App. A, *infra*, p. 4A, n. 2).

The meal allowance is paid biweekly in advance and is included in the trooper's salary, which is paid for prior periods. The cash allowance for meals is described on a state police recruitment brochure as an item to be received in addition to the base salary. The amount of the meal allowance is a subject of negotiations between the state and the police troopers' union (App. A, *infra*, pp. 4A-5A).[3]

The State of New Jersey instituted the cash meal allowance for its police troopers in July, 1949. Prior to that time, all troopers were provided with meals during their hours of active duty at various meal stations throughout the state. When a trooper was unable to eat at an official meal station, he would eat at a public restaurant and obtain reimbursement from the state. The meal station system proved to be unsatisfactory because the troopers consumed too much time in traveling from their duty posts to the nearest meal station and thereby left their posts unguarded. As a result, the state closed its meal stations and established a cash allowance system, in accordance with the practice adopted by several neighboring states (App. A, *infra*, pp. 3A-4A).

Under the cash meal allowance system, troopers are expected to eat within their assigned patrol area. They must first check in with the officer in charge of their assignment station and request permission to eat. Troopers are subject to call during their meal period. Thus, a trooper must advise the officer in charge where he may be reached while eating (App. A, *infra*, p. 5A).

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[3] The meal allowance for troopers was originally set in 1949 at $70 per month, with adjustments made for those officers who were not on active duty (App. A, *infra*, p. 4A).

The state places no restrictions on the use of the cash meal allowances provided to the police troopers. They are not required to account to the state for their meal expenses. A trooper may eat at home if he lives within his assigned duty area, eat in a public restaurant, or bring his own meal and eat in or near his patrol car. The amount of the meal allowance is not calculated to provide reimbursement for any specific number of meals (App. A, *infra*, p. 5A).

On his 1970 income tax return respondent reported $9,066 in wages. That amount included his base salary of $8,739.38 and cash meal allowances of $326.45. The state included the latter amount on respondent's Wage and Tax Statement (Form W-2) for the year. However, respondent did not include in income the remaining $1,371.09 meal allowance on his return.[4] He also claimed a deduction of $405 for food maintenance expenses (App. A, *infra*, pp. 7A-8A).

On audit, the Commissioner of Internal Revenue disallowed respondent's claimed deduction for food maintenance expenses. After discovering that respondent had not reported as income the remaining $1,371.09 of cash meal allowances, the Commissioner determined that such amount was properly includable in respondent's gross income and accordingly increased the deficiency (App. A, *infra*, p. 8A).[5]

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[4] The state began to withhold income tax from the cash meal allowances paid to the troopers as of October 1, 1970. Hence, only $326.45 of the total $1,697.54 was reported on respondent's 1970 Wage and Tax Statement (App. A, *infra*, p. 7A, n. 3).

[5] The Commissioner raised the issue of includability of the cash meal allowances by amending his answer in the Tax Court. See Section 6214(a) of the Internal Revenue Code of 1954 (App. A, *infra*, p. 8A).

In a reviewed decision, the Tax Court held, with six dissents, that the cash meal payments were includable in respondent's gross income under Section 61(a) of the Internal Revenue Code of 1954 (App. A, *infra*, pp. 8A-19A). In so holding, the court relied upon the broad statutory definition of "gross income" in Section 61(a), which provides that "[e]xcept as otherwise provided, • • • gross income means all income from whatever source derived • • •." In the Tax Court's view, its conclusion followed from the decisions of this Court holding that by broadly defining gross income, Congress intended to "tax all gains except those specifically exempted." *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 430 (App. A, *infra*, p. 12A).

Moreover, the Tax Court unanimously held that the cash payments did not qualify for the exclusion from gross income under Section 119 of the Code (App. A, *infra*, pp. 19A-24A). That statute provides for an exclusion from gross income for the value of any meals furnished to an employee by his employer for the convenience of the employer, but only if the meals are furnished on the business premises of the employer. In the Tax Court's view, the meal allowances were not excludable under Section 119 because they were cash payments and not meals furnished in kind. It therefore found it unnecessary to consider whether the payments met the other prerequisites of Section 119 (App. A, *infra*, p. 19A).[6]

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[6] The Tax Court also held that respondent could deduct two-thirds of the meal allowance as a business expense because he was "away from home" within the meaning of Section 162(a)(2) of the Code (App. A, *infra*, pp. 24A-26A). The Commissioner did not appeal that aspect of the Tax Court's decision and it is no longer at issue.

The court of appeals reversed *per curiam* (App. B, *infra*, pp. 38A-41A). In concluding that the cash meal allowances were not includable in the statutory definition of gross income, the court adhered to its prior decision in *Saunders* v. *Commissioner*, 215 F.2d 768, reversing 21 T.C. 630, in which it ruled in favor of the New Jersey State troopers with respect to the same cash payments. The court further held that the payments were excludable from income under Section 119, stating: "We • • • align ourselves with the Fifth, Eighth, and Tenth Circuits" (App. B, *infra*, p. 41A).[7]

REASONS FOR GRANTING THE WRIT

1. In holding that cash payments to state police troopers that are designated as meal allowances are not "gross income" within the meaning of Section 61(a) of the Internal Revenue Code of 1954, and are in any event excludable under Section 119 of the Code, the decision of the court of appeals squarely conflicts with *Wilson* v. *United States*, 412 F.2d 694 (C.A. 1). There, the court ruled that such payments were taxable, "start[ing] with the proposition," rejected by the decision below, "that all remuneration received for services is gross income unless it falls within a specific exclusion" (*id.* at 695). Although the First Circuit in *Wilson* acknowledged that *Saunders* v. *Commissioner*, 215 F.2d 768 (C.A. 3), to which the court below adhered, was to the contrary, it refused to follow it (412 F.2d at 697).

The decision below further conflicts with *Wilson* on whether cash payments designated as meal allowances are excludable from gross income under Section 119. *Wilson*

[7] *United States* v. *Barrett*, 321 F.2d 911 (C.A. 5); *United States* v. *Morelan*, 356 F.2d 199 (C.A. 8); and *United States* v. *Keeton*, 383 F.2d 429 (C.A. 10).

held that Section 119 is limited to meals served in kind on the employer's business premises. Here, however, the court of appeals "align[ed] [itself] with the Fifth, Eighth, and Tenth Circuits" (App. B, *infra*, p. 41A), which have ruled that Section 119 covers cash payments for meals. See *United States* v. *Barrett*, 321 F.2d 911 (C.A. 5); *United States* v. *Morelan*, 356 F.2d 199 (C.A. 8); *United States* v. *Keeton*, 383 F.2d 429 (C.A. 10). In holding to the contrary, the First Circuit in *Wilson* refused to follow the decisions of these three other circuits, stating "[w]ith due respect, we do not find them persuasive" (412 F.2d at 697).

The question of the taxability of these cash meal allowances is of considerable administrative importance. We are advised by the Internal Revenue Service that 15 states currently make such payments to 10,301 police troopers in the annual amount of approximately $10,000,000. Moreover, the statute of limitations remains open for audit of the troopers of four other states which have only recently discontinued a meal allowance system. Finally, there are 2,193 cases involving this issue presently pending administratively in the Internal Revenue Service with $4,518,573 in taxes at stake.[8] This Court should resolve the conflict

[8] The issue is presently awaiting decision in one court of appeals (*Koerner* v. *United States*, 404 F. Supp. 1128 (S.D. W. Va.), on appeal to C.A. 4, No. 76-1495, argued December 9, 1976), and in two district courts (*Friar* v. *United States*, Civ. No. 75-CV-139-C, W.D. Mo., and *Cronin* v. *United States*, Civ. No. H-75-270, D. Conn.). In *Smith* v. *United States*, No. 75-1609, decided December 13, 1976, the Fifth Circuit reaffirmed its holding in *United States* v. *Barrett*, 321 F.2d 911, that such cash payments were excludable under Section 119. We are advised by the Clerk of the Fifth Circuit that the court has delayed entering judgment in *Smith* pending its disposition of the taxpayer's motion to assess attorney's fees and costs.

among the circuits in order to establish a uniform rule for the tax treatment of such cash payments for meals.

2. The court of appeals' holding that the payments were not includable in gross income seriously erodes the fundamental principle of our tax law that reimbursement or payment of non-deductible personal expenses by an employer represents taxable compensation to the employee. See, *e.g., Old Colony Trust Co.* v. *Commissioner*, 279 U.S. 716, 729-730. If the decision below is permitted to stand, it will invite further attempts by employers to provide tax-free compensatory payments to employees to defray the costs of meals or other personal living expenses. Thus, while the revenue impact of the cash meal allowances to state police troopers is itself substantial, any narrowing of the statutory concept of gross income in the employee compensation area threatens revenue losses of far greater proportions.

Section 61(a) of the Internal Revenue Code provides that "[e]xcept as otherwise provided • • •, gross income means all income from whatever source derived • • •." As this Court has repeatedly observed with respect to its comparable statutory predecessors, this language was used by Congress to exert "the full measure of its taxing power." *Helvering* v. *Clifford*, 309 U.S. 331, 334; *Helvering* v. *Midland Mutual Life Ins. Co.*, 300 U.S. 216, 223; *Douglas* v. *Willcuts*, 296 U.S. 1, 9; *Irwin* v. *Gavit*, 268 U.S. 161, 166. The broad catch-all phrase "from whatever source derived," which first appeared in Section II(B) of the Revenue Act of 1913, 38 Stat. 114, 167, shows that "Congress applied no limitations as to the source of taxable receipts, nor restrictive labels as to their nature." *Commissioner* v.

Glenshaw Glass Co., 348 U.S. 426, 429-430. Thus, the Court has consistently recognized that it was "the intention of Congress to tax all gains except those specifically exempted" (*ibid.*). See also *Commissioner* v. *Lo Bue*, 351 U.S. 243, 246.

Here, there can be no doubt that the unrestricted cash payments to the state police troopers fall within the broad reach of the statutory definition of "gross income." They were "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." *Commissioner* v. *Glenshaw Glass Co., supra*, 348 U.S. at 431.

Moreover, the cash meal allowances were characterized in a recruitment brochure as an item to be paid in addition to the base salary, and were subject to negotiations between the state and the troopers' union (App. A, *infra*, pp. 4A-5A). As the Tax Court observed, the payment "was obviously compensatory to a trooper to the extent it paid for food which he otherwise would have had to pay for from some other source" (App. A, *infra*, p. 13A). Since the statutory definition of gross income "is broad enough to include in taxable income any economic or financial benefit conferred on the employee as compensation, whatever the form or mode by which it is effected" (*Commissioner* v. *Smith*, 324 U.S. 177, 181), the court of appeals erred in concluding that the cash meal allowances were not part of respondent's gross income.

While the court of appeals adhered to its prior pre-1954 Code decision in *Saunders* v. *Commissioner, supra*, 215 F.2d 768 (C.A. 3), involving the same New Jersey police troopers, the Tax Court majority correctly recognized (App. A, *infra*, pp. 10A-19A) that *Saunders* necessarily conflicts with this Court's broad construction of the statutory defi-

nition of gross income. *Saunders* was decided prior to this Court's holdings in *Glenshaw Glass Co.* and *Lo Bue.* More importantly, the "convenience of the employer" rationale of the Regulations under the 1939 Code,[9] upon which *Saunders* rests, is now confined exclusively to Section 119, which was added at the time of the 1954 codification. If, as we submit, the cash payments are not excludable under Section 119, they cannot escape taxation on the ground that they are not gross income within the meaning of Section 61(a). *Saunders* therefore is no longer a viable precedent.

3. The court of appeals' holding that the cash payments designated as meal allowances are excludable under Section 119 is equally erroneous. That provision permits the exclusion from an employee's gross income of "the value of any meals * * * furnished to him by his employer for the convenience of the employer, but only if—(1) in the case of meals, the meals are furnished on the business premises of the employer * * *." The use of the terms "value" and "furnished" shows that the statute requires meals to be furnished in kind. The pertinent legislative history reinforces that conclusion. Thus, the Senate Finance Committee Report stated (S. Rep. No. 1622, 83d Cong., 2d Sess. 190-191 (1954)): "Section 119 applies only to meals or lodging furnished in kind. Therefore, any cash allowances for meals or lodging received by an employee will continue to be includible in gross income to the extent that such allowances constitute compensation." Accord: Treasury Regulations, Section 1.119-1(c)(2), Appendix D, *infra*, p. 46A.

[9] See Treasury Regulations 111, Section 29.22(a)-3.

In light of the statutory language and the legislative history, the cash allowances at issue here cannot qualify for exclusion under Section 119. Cash payments are not, under any stretch of the imagination, meals furnished in kind. Moreover, since the troopers consumed these meals in various public restaurants, the statutory requirement that the meals be furnished on the business premises of the employer was not met. See *Dole* v. *Commissioner*, 43 T.C. 697, 707-709 (Raum, J., concurring), affirmed, 351 F.2d 308 (C.A. 1). As the First Circuit observed in *Wilson* v. *United States, supra*, 412 F.2d at 697, in holding that such payments were neither meals in kind nor furnished on the employer's business premises, "[t]hus we have a case where history, sense and language all coincide."[10] The rejection of the plain statutory language and its legislative history by the decision below calls for review by this Court.

[10] The congressional intention to exclude cash allowances from the coverage of Section 119 is further demonstrated by the enactment of Section 120 in 1954. That latter provision permitted police officers to exclude from income subsistence allowances not in excess of $5 per day. However, in 1958, Congress repealed Section 120 (see Section 3 of the Technical Amendments Act of 1958, 72 Stat. 1606, 1607) in order "to bring the tax treatment of subsistence allowances for police officials into line with the treatment of such allowances in the case of other taxpayers * * *" (H.R. Rep. No. 775, 85th Cong., 1st Sess. 7 (1957)). If, as the decision below holds, such payments are excludable under Section 119, the repeal of Section 120 would be ineffective.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1977.

APPENDIX A

65 T. C. No. 5

UNITED STATES TAX COURT

ROBERT J. KOWALSKI AND NANCY A. KOWALSKI, PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

Docket No. 112-73. Filed October 14, 1975.

Held: Amount advanced to petitioner, a New Jersey State trooper, as a meal allowance is includable in his income under sec. 61, I.R.C. 1954, and is not excludable under sec. 119, I.R.C. 1954 since the amount was paid to him in cash. *Saunders v. Commissioner,* 215 F. 2d 768 (3d Cir. 1954), reversing 21 T.C. 630 (1954), is not controlling since it involved years prior to the addition to the Code of sec. 119 providing for exclusion from income of the value of meals furnished for the convenience of the employer on the business premises of the employer.

Held, further, Petitioner is entitled to deduct the amount he spent for meals while away from home overnight in his duties as a trooper which amount is determined from the facts to be $1,136.

Carl D. Cordes, Herrick K. Lidstone, and *Richard Kilcullen,* for the petitioners.

Irwin R. Cohen, for the respondent.

SCOTT, *Judge*: Respondent determined a deficiency in petitioners' Federal income tax for the taxable year 1970 in the amount of $330.70. The issue in controversy is whether $1,697.54 received by petitioner Robert J. Kowalski from the State of New Jersey as a food maintenance allowance constitutes gross income under section 61, I.R.C. 1954;[1] or, if the above amount does constitute gross income, whether it is properly excludable from gross income under section 119; or failing these two, whether petitioners can properly claim an ordinary and necessary business expense deduction under section 162(a)(2) for these amounts.

FINDINGS OF FACT

Some of the facts have been stipulated and are so found. The stipulation of facts, together with the exhibits attached thereto, are incorporated herein by this reference.

Petitioners, Robert J. Kowalski (hereinafter petitioner) and Nancy A. Kowalski, are husband and wife residing in Clark, New Jersey, at the time of the filing of their petition herein. Petitioners filed a joint Federal income tax return with the Internal Revenue Service Center, Philadelphia, Pennsylvania, for the calendar year 1970.

Petitioner, at all times relevant herein, was a trooper with the Division of State Police of the Department of Law and Public Safety of the State of New Jersey (hereinafter

[1] All statutory references are to the Internal Revenue Code of 1954 as amended unless otherwise indicated.

NJSP or state police). He originally joined the NJSP in August 1960 and was reenlisted in 1962 and 1964. During his second term he received tenure, and at all times petitioner was a trooper in good standing with the NJSP.

The NJSP, created by act of the New Jersey legislature on March 29, 1921, is responsible statewide for all police functions and has primary responsibility in those areas of the state not within the jurisdiction of local authority. It also assists local police departments in the administration of their affairs.

The executive and administrative head of the NJSP is the Superintendent of State Police (hereinafter Superintendent). He is appointed by the Governor of the state. The Superintendent, with the approval of the Governor, makes all rules and regulations for the discipline and control of the state police. The Superintendent is authorized to provide for the payment of commutation of rations and quarters (hereinafter meal allowance) to those members of the state police not provided with rations and quarters by the state.

The NJSP, organized along military lines, is headed by the Superintendent who holds the rank of colonel. Below him in rank is the Deputy Superintendent who has the statutory rank of major. The remainder of the state police is comprised of men with the statutory ranks of captain, lieutenant, sergeant, and trooper. In 1970 there were approximately 1,500 people in the NJSP, of whom approximately 900 were troopers.

Prior to July 1949, all troopers were supplied with meals at meal stations throughout New Jersey at the expense of the state. In those instances where a trooper was unable

to eat at a meal station, he would secure a meal at his own expense at a public eating place and submit a voucher for reimbursement from the state. Despite various efforts at enforcing this system, it proved unsatisfactory. Troopers would have to leave their posts for approximately an hour and a half to eat these meals leaving their patrol areas unguarded. Efforts aimed at staggering these eating periods proved unworkable and drew complaints from the individuals in charge of the eating stations. Procedures adopted by neighboring states using a meal allowance system were surveyed, and, effective July 1, 1949, the state discontinued its meal operations and instituted a meal allowance system.

This system provided for a daily meal allowance for all members of the state police while they were on active duty. The meal allowance for troopers was set at $70 per month with adjustments made for various non-active duty situations. By January 1970 the meal allowance rate for troopers was $1,704 per year,[2] and by July 1970 this amount was paid without adjustment except for leave for military training. The meal allowance is paid biweekly in advance and is included, although separately stated, with the trooper's salary which is paid in arrears. The meal allowance money is also separately accounted for in the state police's accounting system. Funds are never co-mingled between the salary and meal allowance accounts. All troopers are entitled to the same meal allowance regardless of years in

[2] Although petitioner was entitled to $1,704 in meal allowance money for the calendar year 1970, the amount in issue is only $1,697.54. This slight difference is not relevant to the question at hand.

service or the actual amount of time spent on active duty. Their salaries increase with their length of service.

This system was adopted to provide the state and the public with better police protection. It also proved to be a less expensive method of handling this problem. The meal allowance was not intended to represent additional compensation.

Under this system the troopers are expected to eat at a public eating place within their assigned patrol area. They must first check in with the officer in charge of the station and request permission to eat. The trooper must advise the officer in charge where he may be reached while eating and is subject to call during the eating period. Such calls are not an uncommon experience. Troopers are not permitted to accept any free meals.

There are no restrictions placed on the use of the meal allowance provided to the troopers. They are not required to account to the state for their meal expenses. A trooper may eat at home if it is within his assigned patrol area, or he may bring his own meal and eat in or near his patrol car. The amount of the meal allowance is not calculated to provide reimbursement for any specific number of meals.

On the advertising brochure the meal allowance is described as an item to be received in addition to the base salary. State police recruits are told that the meal allowance will be paid to them in cash and is in lieu of the furnishing of meals they are required to eat while they are on active duty. The meal allowance is also a subject of negotiations between the state and the troopers' union.

Petitioner, in a normal 30-day month, is on active duty 390 hours and is on duty leave 330 hours. The duty leave

hours are composed of 6 days off, 10 overnight passes of 15 hours each, and 9 passes of 4 hours each. A trooper is on active duty when he is in uniform performing his official duties. A trooper, however, is on call 24 hours a day and his actual active duty time is determined by the manpower needs of the station to which he is assigned.

It is the policy of the state police to give every man a broad scope of experience by giving him various assignments as operations permit. During calendar year 1970 petitioner had several different assignments.

From January to March 9, 1970 petitioner was assigned to a radar team on the New Jersey Turnpike. He worked a shift, was required to eat his meals on the turnpike, and slept at his then home in Linden, which was approximately 13 miles from his station in Newark.

From March 9 through May 7, 1970, petitioner was assigned to perform general police field duties out of the Highstown Barracks in central New Jersey which is approximately 42 miles from his home in Linden. While there petitioner was required to sleep at the barracks. His normal active duty period consisted of two consecutive 24-hour periods. During this period petitioner would perform his field patrol duties plus any follow-up investigative work that occurred. A normal duty day consists of approximately 16 to 18 hours of work. Petitioner generally ate his meals in a public restaurant in his assigned area. Cooking facilities were available if he was allotted time to purchase and prepare his own meal. During this tour of duty petitioner was assigned on two occasions to riot duty of approximately 5 days duration each. On each occasion he was on 24-hour duty, eating and sleeping when and where possible.

From May 7 through June 28, 1970, petitioner was assigned to screen the applications of prospective recruits for the state police. He worked from his home, traveling throughout the state interviewing people in connection with the recruit's application. During this period petitioner slept at home but ate his meals primarily on the road.

From June 28 through the end of the year petitioner was reassigned to the Highstown Barracks for general police duties. On several occasions he was given special assignments consisting of riot duty, stand-by status for riot duty, participation in vice raids, observing at state police headquarters, and mandatory in-service training. He did not, in any of these situations, sleep at home or at the Highstown Barracks.

Petitioner was required to keep a record of his activity for each 24-hour period. Based on these records petitioner spent 200 nights away from home on active duty. While on active duty he spent approximately $2 for breakfast, $3 for lunch, and $5 for dinner. Petitioner, in 1970, spent his entire amount of meal allowance received for meals while on active duty.

Petitioner, on his 1970 tax return, reported $9,066 in wages and salaries. Included in this figure is petitioner's base salary of $8,739.38 and meal allowance of $326.45.[3] He

[3] From January through September 30, 1970, federal income tax was not deducted and withheld from the meal allowance paid to the troopers based on *Saunders v. Commissioner*, 215 F. 2d 768 (3rd Cir. 1954), reversing 21 T.C. 630 (1954). In October 1970 the state began to deduct and withhold the appropriate amounts after correspondence and discussions with the respondent. Consequently the sum of $326.45 was included on petitioner's Wage and Tax Statement (Form W-2) for the year 1970.

did not include the remaining $1,371.09 of meal allowance in the tax return. Petitioner claimed as a miscellaneous itemized deduction $405 of food maintenance expenses.[4] Respondent disallowed this deduction determining that the meal allowance funds were includable as taxable income under section 61 and calculated a deficiency of $69.54.

Subsequently, respondent discovered that the remaining $1,371.09 of meal allowance funds received by petitioner in 1970 was not included in petitioner's tax return. Respondent filed an Amendment to Answer of petitioner's petition, to which the petitioner did not object, determining that this amount should also be included in gross income. Respondent accordingly increased the deficiency to $330.70. Included in this increase is an amount attributable to a reduction in petitioner's medical expense deduction caused merely by the increase in petitioner's adjusted gross income.

Opinion

Petitioner's primary position in this case is that the monthly amount he received does not constitute gross income under section 61(a). In the alternative petitioner contends that if the monthly allowance does constitute gross income, it is properly to be excluded under section 119 or, if not excludable under that section, is deductible as an ordinary and necessary business expense under section 162(a)(2).

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[4] Although there is a minor difference between the food maintenance allowance included as salaries and wages in the tax return as income and the amount of the deduction taken by petitioner, respondent does not dispute the correctness of the amount claimed as a deduction.

In support of his contention that the monthly allowance is not income under section 61(a), petitioner relies primarily on the decision of the United States Court of Appeals for the Third Circuit, to which an appeal in this case would lie, in *Saunders v. Commissioner,* 215 F. 2d 768 (3rd Cir. 1954), reversing 21 T.C. 630 (1954), decided September 22, 1954. In fact, petitioner argues that under our holding in *Jack E. Golsen,* 54 T.C. 742 (1970), affd. 445 F. 2d 985 (10th Cir. 1971), cert. denied 404 U.S. 940 (1971), we are bound to follow the decision of the Third Circuit in the *Saunders* case.

As petitioner points out, the Third Circuit in the *Saunders* case concluded that cash rations payments received by New Jersey state policemen under circumstances not substantially different from those involved in the instant case were not required to be included in gross income under section 22(a), I.R.C. 1939, the predecessor section of section 61(a). In reaching this conclusion, the court considered first whether the cash payment to defray the cost of meals was furnished to state policemen by the State of New Jersey for the "convenience of the employer," and having concluded that it was, proceeded to discuss whether it was properly excludable under the rationale of the regulations excluding from gross income quarters or meals furnished to employees for the convenience of the employer. In that case the court concluded that the "rationale of the rule should make it applicable to determine the extent of gross income either when quarters and meals are furnished in kind or cash is paid in lieu thereof." The court pointed out that "[a]dmittedly, the payment of cash to an employee is normally compensatory and probably more obviously so than a payment in kind," but that, "an

employee may be furnished cash which is not compensation." The court then stated, at 772:

> In the past, the Bureau has recognized that cash received by an employee for similar purposes may not be compensation: in O.D. 11, 1 Cum.Bull. 66 (1919), it was held that an American Red Cross employee receiving maintenance but no pay should return as income only the excess of the amount received over his actual living expenses; and in O.D. 514, 2 Cum. Bull. 90 (1920), it was ruled that supper money furnished an employee working after regular hours and not considered as compensation was furnished for the convenience of the employer and was not taxable. Likewise, the courts have considered maintenance furnished in kind and in cash on the same basis for determining an individual's taxable compensation. In Jones v. United States, 1925, 60 Ct. Cl. 552, it was held that neither the value of living quarters furnished or cash in lieu of quarters paid an army officer were income; and citing the Jones case, it was stated in Bercaw v. Commissioner, 4 Cir. 1948, 165 F. 2d 521, at page 524: "This conclusion [that payments by an army officer for meals and 'striker' service are not deductible for tax purposes] is inescapable when it is remembered that this officer has been paid commutation of quarters and a subsistence allowance, both of which allowances are not considered as income for the purposes of taxation." • • •

The *Saunders* case was decided under the provisions of the 1939 Code which contained no statutory exclusion from gross income for meals and lodging and was decided prior to the decisions of the Supreme Court in *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426 (1955), and *Commissioner v. Lo Bue*, 351 U.S. 243 (1956), which as hereinafter

discussed amplified prior decisions concerning the Congressional intent in defining gross income to include "all income from whatever source derived" except as otherwise provided by statute. For these reasons, we conclude that the *Saunders* case is not controlling here and under our holding in the *Golsen* case we are not required to follow it.

In our view the Third Circuit in *Jacob v. United States*, 493 F. 2d 1294, 1297 (3rd Cir. 1974), has recognized the distinction in those cases involving claimed exclusion from gross income arising under the 1939 Code and the 1954 Code. In *Jacob v. United States, supra*, the Third Circuit held that a doctor required to reside on the premises of an institution for mentally retarded persons to be available on a 24-hour per day basis was entitled to exclude under section 119 the value of groceries provided him by his employer as "meals" furnished to him. In reaching its conclusion, the court referred to "the so-called 'state trooper' cases," holding cash allowances to be excludable under section 119, although it recognized that these cases were "not exactly in point." One of the so-called "state trooper" cases cited was the *Saunders* case, the following footnote being made to the citation:

> *Saunders, supra,* involved facts arising prior to 1954 when section 119 was added to the Internal Revenue Code, but the reasoning of *Saunders* was followed in the above-cited post-1954 cases.

This note by the Third Circuit is a recognition that the law applicable to years governed by the 1939 Code differs from the law applicable to years governed by the 1954 Code, and that the *Saunders* case is not "squarely in point" with cases governed by the 1954 Code.

Section 61(a) states that "except as otherwise provided in this subtitle, gross income means all income from whatever source derived, • • •." The broadness of this definition has on numerous occasions been recognized by the Supreme Court. In *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 429-430 (1955), the Court stated:

> But Congress applied no limitations as to the source of taxable receipts, nor restrictive labels as to their nature. And the Court has given a liberal construction to this broad phraseology in recognition of the intention of Congress to tax all gains except those specifically exempted. *Commissioner v. Jacobson*, 336 U.S. 28, 49, 69 S. Ct. 358, 369, 93 L.Ed. 477; *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87-91, 55 S. Ct. 50, 51-53, 79 L.Ed. 211. • • •

Shortly thereafter in *Commissioner v. Lo Bue*, 351 U.S. 243, 246 (1956), the Court pointed out that it had "repeatedly held that in defining 'gross income' as broadly as it did • • • Congress intended to 'tax all gains except those specifically exempted.'"

In the instant case, even though petitioner's employer, the State of New Jersey, furnished the meal allowance to state troopers because it was more convenient to provide a meal allowance than to provide meals for these troopers and because in many instances the proximity of troopers to the area in which their work was being conducted saved time of the troopers in eating meals, the allowance was paid for food for the troopers which otherwise the troopers would have found it necessary to provide for themselves. Also, it is clear that petitioner would have been permitted to bring his lunch and eat it in or near his patrol car and still receive the same meal allowance. Even though we have

found that the meal allowance was not intended as additional compenation, it was obviously compensatory to a trooper to the extent it paid for food which he otherwise would have had to pay for from some other source. We conclude, under section 61, that "except as otherwise provided" in the income tax law, the meal allowance received by petitioner is includable in his gross income. See *United States v. Woodall*, 255 F. 2d 370 (10th Cir. 1958).

In the *Saunders* case, the court recognized that the definition of "gross income" in the taxing statutes was broad, but relying on the long history of meals furnished for the convenience of the employer being excluded from income of taxpayers and the Commisioner's regulations so providing, concluded that there was in fact an exclusion in the income tax laws from gross income for meals or their equivalent furnished for the convenience of the employer. Such an exclusion is now provided in section 119 where the requirements of that section are met.

Petitioner argues that the legislative history of section 119 shows that Congress did not intend to change the "pre-existing law" with respect to cash payment for meals as set forth in the *Saunders* case when section 119 was enacted dealing with the exclusion of meals and lodging from gross income. We do not so interpret this legislative history but rather interpret it to indicate that the only exclusion for meals and lodging intended by Congress to be available to any taxpayer other than members of the Armed Forces after the enactment of the 1954 Code were meals and lodging excludable under the provisions of section 119. The effective date of the enactment of the 1954 Code which contained for the first time any provisions for

exclusion of meals and lodging furnished for the convenience of the employer was August 16, 1954. Obviously, the committee reports all preceded the effective date of the 1954 Code, which on that date had been enacted by Congress and signed by the President. The decision of the Third Circuit in *Saunders v. Commissioner, supra,* as above noted was entered on September 22, 1954, over a month after the final enactment of the 1954 Code.

Section 119 in a form different from its final enactment appeared in the House version of H.R. 8300, which when enacted was the Internal Revenue Code of 1954. H.R. Rept. No. 1337, 83d Cong., 2d Sess. (1954), to accompany H.R. 8300, stated as follows with respect to section 119:

> *Section 119. Meals or lodging furnished for convenience of employer*
>
> This section provides a statutory test for determining the extent to which an employee may exclude from gross income the value of meals or lodging furnished by the employer.
>
> Existing law, as currently interpreted by the Internal Revenue Service and by certain court decisions requires that if meals or lodging represent compensation the value thereof must be included in gross income, even though the employee must accept such meals or lodging in order properly to perform his duties.
>
> Under section 119, if meals or lodging (1) are furnished at the place of employment, and (2) are required to be accepted by the employee at the place of employment as a condition of his employment, the value thereof shall be excluded from gross income, notwithstanding the fact that such meals or lodging represent additional compensation to the employee.

> However, if the two foregoing requirements are not met, the value of any meals or lodging furnished the employee must be included in his gross income to the extent that they constitute compensation. This section applies only to meals or lodging furnished in kind. Therefore, any cash allowances for meals or lodging received by an employee will continue to be includible in gross income, as under existing law, to the extent that such allowances represent compensation.

The Senate Finance Committee Report changed the provision of the House bill to the provision that now appears in section 119, S. Rept. No. 1622, to accompany H.R. 8300 (Pub. L. No. 591), 83d Cong. 2d Sess. (1954), explains the change as follows:

> *Section 119. Meals and lodging furnished for convenience of employer*
>
> This section corresponds to section 119 of the bill as passed by the House. Existing law, as currently interpreted by the Internal Revenue Service and certain court decisions, requires that if meals or lodging represent compensation the value thereof must be included in gross income even though the employee must accept such meals or lodging in order properly to perform his duties. Under section 119 of the bill as passed by the House if meals or lodging are (1) furnished at the place of employment, and (2) are required to be accepted by the employee at the place of employment as a condition of the employment, the value thereof is excludable from the employee's gross income. Under section 119 as amended by your committee, there is excluded from the gross income of an employee the value of meals or lodging furnished to him for the convenience of his employer whether or not such meals or lodging are furnished as compensation. In the case

of meals the exclusion is permitted only if the meals are furnished on the business premises of the employer. In the case of lodging the exclusion is permitted only if the employee is required to accept the lodging on the business premises of the employer as a condition of his employment. The phrase "required as a condition of his employment" means required in order for the employee to properly perform the duties of his employment.

Section 119 applies only to meals or lodging furnished in kind. Therefore, any cash allowances for meals or lodging received by an employee will continue to be includible in gross income to the extent that such allowances constitute compensation.

In the Conference Report, the Senate version of the bill was adopted. The statement in the House Report that "any cash allowances for meals or lodging received by an employee will continue to be includible in gross income, as under existing law, to the extent that such allowances represent compensation" and the statements in the Senate Report that "[s]ection 119 applies only to meals or lodging furnished in kind" and that "therefore, any cash allowances for meals or lodging received by an employee will continue to be includible in gross income to the extent that such allowances constitute compensation" must therefore be viewed in the light of the case law prior to the decision in the *Saunders* case.

As we pointed out in our opinion in *Robert H. Saunders*, 21 T.C. 630, 634, which was decided on January 29, 1954, while the enactment of the 1954 Code was under active consideration in Congress,

There are numerous cases in which it has been held that subsistence and quarters furnished in kind to an employee did not result in realization of income but the *Jones* case, *supra*, [*Jones v. United States*, 60 Ct. Cl. 552 (1925)] which dealt with cash allowances paid an Army officer in commutation thereof, [meals and lodging] appears to be the only one in which it has been held that such cash allowances were not income. This Court specifically distinguished that case in *Gunnar Van Rosen*, 17 T.C. 834, 839-840, to wit:

> while the *Jones* case is authority for the exclusion from gross income by military personnel of cash allowances made to them for subsistence and quarters, it does not, in our opinion, require or justify an extension of the rule therein to similar allowances made to civilian personnel.

Therefore, at the time the enactment of section 119 was under consideration, the only situation in which a cash payment had been considered in a court case to be excludable from gross income was the cash payment to Army personnel in lieu of quarters and rations.[5]

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[5] There were, of course, outstanding the two rulings referred to in *Saunders v. Commissioner*, 215 F. 2d 768 (3rd Cir. 1954) but these were only rulings of the Revenue Service involving special situations. The Commissioner does at times, by ruling, permit the exclusion from income of items without basis in case law. Prior to a statutory provision for a *deduction from gross income* of certain moving expenses, the Commissioner ruled in Rev. Rul. 54-429, 1954-2 C.B. 53, that where an employee is transferred from one permanent duty station to another, reimbursement received for cost of moving himself, his immediate family, and his household goods is not includable in income. This ruling specifically modified prior rulings that amounts paid by the Government for transportation of the families of Army Officers (O.D. 1135, 5 C.B. 174 (1921)) and of dependents of officers and men of the Coast Guard

In our view the explanation of section 119 that "any cash allowances for meals or lodging received by an employee will continue to be includible in gross income, as under existing law, to the extent that such allowances represent compensation" was made in the committee reports in the light of the knowledge that the only situation in which such cash allowances had not, under existing law, been held to be includable in income as representing compensation was in the case of military personnel.

Soon after the decision in *Jones v. United States,* 60 Ct. Cls. 552 (1925), the exclusion of the cash allowances for quarters and rations from income of military personnel was written into respondent's regulations and a comparable provision has been included in the regulations since that time.

In our view the lengthy discussion of whether under section 119, the "value of meals" could properly be interpreted to include the value of groceries cooked into meals on the employer's premises in the opinion of the Third Circuit in *Jacob v. United States, supra,* in effect is a recognition that section 119 is the only basis for excluding the value of meals and lodging from the income of a taxpayer other than a member of the Armed Forces since the

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(I.T. 3022, C.B. XV-2, 76 (1936)) from one permanent duty station to another is additional compensation to the recipient. I.T. 3022 relied on our holding in *Leland D. Webb,* 1 B.T.A. 759 (1925), that a Naval Officer could not deduct the cost of transportation of his wife from one permanent duty station to another. Rev. Rul. 54-429 cites no change in case law but merely a change in position by the Commissioner. Compare O.D. 514, 2 C.B. 90 to *Darrell Spear Courtney.* 32 T.C. 334, 344-345 (1959) and cases there cited.

enactment of the 1954 Code. Otherwise, having concluded that the groceries were furnished to the taxpayer in the *Jacob* case for the convenience of the employer, the court could merely have cited its opinion in the *Saunders* case and the discussion of the provisions of section 119 and the regulations issued thereunder would have been unnecessary.

Since we have concluded that the meal allowance paid to petitioner in this case is includable in his gross income under section 61(a), it is necessary to consider whether the allowance is excludable under section 119.[4] That section provides for the exclusion from the gross income of an employee of "the value of any meals" furnished to him by his employer for the convenience of the employer. Section 1.119-1(c)(2) of respondent's regulations provides that "the exclusion provided by section 119 applies only to meals and lodging furnished in kind by an employer to his employee." It was this provision of the regulations, as well as the statutory provision referring to the "value" of meals that was under consideration in the *Jacob* case.

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[4] SEC. 119. MEALS OR LODGING FURNISHED FOR THE CONVENIENCE OF THE EMPLOYER.

There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him by his employer for the convenience of the employer, but only if—

(1) in the case of meals, the meals are furnished on the business premises of the employer, or

(2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.

In determining whether meals or lodging are furnished for the convenience of the employer, the provisions of an employment contract or of a State statute fixing terms of employment shall not be determinative of whether the meals or lodging are intended as compensation.

As the court pointed out in the *Jacob* case, and as we pointed out in *Burl J. Ghastin*, 60 T.C. 264, 269-270 (1973), the courts of appeals for several circuits have held cash allowances to state troopers to be excludable from the trooper's gross income under section 119 where the Court considered the cash allowances to be furnished for the convenience of the employer. *United States v. Barrett*, 321 F. 2d 911 (5th Cir. 1963), affirming 205 F. Supp. 307 (S.D. Miss., 1962); *United States v. Morelan*, 356 F. 2d 199 (8th Cir., 1966), affirming 237 F. Supp. 879 (D. Minn. 1965); *United States v. Keeton*, 383 F. 2d 429 (10th Cir. 1967), affirming 256 F. Supp. 576 (D. Colo. 1966).

The district court opinion in the *Barrett* case had held the cash payments not to constitute income under section 61 without citation of cases but merely with the statement (205 F. Supp. at 308):

> The Congress has not seen fit to enact a statute making such money income. The Commissioner cannot, under the guise of an interpretation, enlarge upon a tax statute and create a tax incident where none otherwise exists.

The Fifth Circuit after reciting the fact that the district court held the amounts paid to the Mississippi highway patrolmen for reimbursement for the cost of meals purchased while on duty not to be includable in their gross to discuss the case and affirmed it on the reasoning that the income and stating, "we affirm," proceeded in its opinion amounts of the cash payments were excludable under section 119.

We pointed out in *Burl J. Ghastin, supra*, that the facts in *Barrett, Morelan,* and *Keeton* each differed. The facts in each of those cases differ somewhat from the facts in the instant case and the facts in *Ghastin* have some difference from the facts in the instant case. However, if we accepted the common holding of the *Barrett, Morelan,* and *Keeton* cases, that the words, "value of meals" as used in section 119 include a cash allowance for meals, we would then have to consider whether all the other aspects of section 119 were met in the instant case so as to entitle petitioner to exclude from income the cash allowance he received from the State of New Jersey. In the *Ghastin* case we stated that in our view "meals" as used in section 119 was properly interpreted in *Wilson v. United States*, 412 F. 2d 694, 697 (1st Cir. 1969), affirming 292 F. Supp. 195 (D. N.H. 1968), to refer to meals furnished in kind. We stated our agreement with the holding in the *Wilson* case that the legislative history clearly supported the interpretation that section 119 applied only to meals furnished in kind.

In the *Jacob* case the Third Circuit followed its citation of the *Keeton, Morelan,* and *Barrett* cases with "but see *Wilson v. United States*, 412 F. 2d 694 (1st Cir. 1969)," but did not state its view as to which interpretation of section 119 it considered proper, merely concluding that those cases were not strictly in point. The issue considered by the Third Circuit in the *Jacob* case was considered by that court to be comparable to the issue in *Michael A. Tougher, Jr.*, 51 T.C. 737 (1969), affirmed per curiam 441 F. 2d 1148 (9th Cir. 1971), in which this Court held that an FAA employee living on a remote island in the Pacific Ocean

was not entitled to exclude from gross income the value of groceries furnished from an FAA commissary since such groceries did not constitute meals within the meaning of section 119. The Third Circuit stated that it rejected the interpretation of the *Tougher* case that the term "meals" should be contrued to apply only to prepared, ready-to-eat portions of food, but held that "the furnishing of groceries to the taxpayer • • • where such groceries were furnished for the convenience of the employer on the premises of the employer and where such groceries were prepared into meals and consumed by the taxpayer on the employer's premises constitutes meals furnished within the meaning of section 119."

In our view the meal allowance furnished to petitioner is not excludable under section 119 since it was a cash allowance and not meals furnished in kind. For this reason it is unnecessary for us to consider whether the facts here would otherwise bring the meal allowance furnished to petitioner within the scope of section 119.

Petitioner makes a final argument that the New Jersey State police are in effect part of the military and therefore should be entitled to exclude the cash allowance on the same basis as military personnel are entitled to such an exclusion. Petitioner quotes the provisions of section 1.61-2(b), Income Tax Regs.,[7] that amounts received by

[7] Sec. 1.61-2(b) *Members of the Armed Forces, Coast and Geodetic Survey, and Public Health Service.* Subsistence and uniform allowances granted commissioned officers, chief warrant officers, warrant officers, and enlisted personnel of the Armed Forces, Coast and Geodetic Survey, and Public Health Service of the United States, and amounts received by them as commutation of quarters, are to be excluded from gross

members of the Armed Forces, Coast and Geodetic Survey, and Public Health Service as commutation of quarters and as subsistence allowances and the value of quarters and subsistence furnished to them are excludable from their gross income. Petitioner argues that the same rationale which justifies the exclusion of such amounts by military personnel justifies the exclusion of the meal allowance by a state trooper. In our view the two situations are not comparable. In fact, Congress in the 1954 Code enacted as section 120 thereof a provision allowing an exclusion of any amount received as a statutory subsistence allowance by a taxpayer who was employed as a police official by any State, Territory, or possession of the United States to the extent such statutory subsistence allowance did not exceed $5 a day. The House and Senate reports with respect to the enactment of section 120 both referred to the section as "new."[8] In our view the fact that this provision was placed

income. Similarly, the value of quarters or subsistence furnished to such persons is to be excluded from gross income. For the exclusion from gross income of—

(1) Disability pensions, see section 104(a)(4) and the regulations thereunder;

(2) Mustering-out payments, see section 113 and the regulations thereunder;

(3) Miscellaneous items, see section 122. However, the per diem allowance in lieu of subsistence and the mileage allowance received by such persons while in a travel status or on temporary duty away from their permanent stations shall be included in their gross income.

[8] H. Rept. No. 1337, to accompany H.R. 8300 (Pub. L. No. 591) 83d Cong., 2d Sess. (1954) stated with respect to section 120:

Section 120. *Statutory subsistence allowance received by police*

This section is new and provides for an exclusion from gross income for any amount received as a statutory sub-

in the 1954 Code even though the provision was repealed in 1958, clearly indicates not only that a cash allowance was not contemplated under section 119 but also that it was not the view of Congress that policemen would come under the exclusion then long accepted for military personnel.

Petitioner's final contention is that he is entitled to deduct the entire amount he received as a meal allowance as travel expenses while away from home. Petitioner points

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sistence allowance by a taxpayer who is employed as a policeman by any State, Territory, or possession of the United States or any political subdivision thereof or by the District of Columbia.

The term "police official" in this section includes an employee of any of the foregoing governmental units who has police duties, such as a sheriff, a detective, or a State police trooper, however designated. For example, it encompasses the State police in Georgia who are designated the Georgia Bureau of Investigation.

The exclusion under this section is limited to a statutory subsistence allowance which does not exceed the rate of $5 per day. To the extent that any amounts received as a statutory subsistence allowance are excludable from gross income under this section, no deduction is allowable for expenses in respect of which the statutory allowance is paid; however, any expenses in excess thereof may be deducted if they are otherwise allowable as a deduction. For example, if a State statute provides a subsistence allowance of $5 per day, but the taxpayer, a State police trooper, incurs expenditures of $7.50 for meals while away from home overnight on official police duties, he would be entitled to a deduction of $2.50 under subparagraph (2) (B) of section 62 (relating to expenses for travel away from home). The remaining $5 would be disallowed as a deduction under this section since he is permitted to exclude $5 as a statutory subsistence allowance.

S. Rept. No. 1622, to accompany H.R. 8300 (Pub. L. No. 591, 83d Cong. 2d Sess. (1954), contained substantially the same statements with respect to sec. 120.

out that travel away from home was held in *United States v. Correll*, 389 U.S. 299 (1967), to exclude travel requiring "neither sleep nor rest" but that the record shows that petitioner was away from his duty station in Highstown Barracks and Newark for at least 36 days on assignment requiring sleep and rest. Petitioner points out that since he spent at least the amount of his meal allowance while on active duty and since he was on active duty at times away from both his residence and his duty station in Highstown Barracks and Newark, he should be entitled to the full amount of his meal allowance as a deduction.

Clearly, petitioner was away from home for a substantial portion of the time he was on active duty, whether his home be considered as his place of residence or as the Highstown duty station. We have found from the records petitioner kept that he spent 200 nights away from home on active duty. Certain of these nights were spent at the Highstown duty station. However, in a situation such as petitioner's where his duty station was changed at various times during the year, in our view under our holding in *Hollie T. Dean*, 54 T.C. 663, 667 (1970), that where a taxpayer does not have a "*nontemporary* principal place of business away from the vicinity of his residence, then his place of residence remains his home for tax purposes," we conclude that petitioner in this case was away from home within the meaning of section 162(a)(2) for the 200 days that we found him to be "away from home."

Respondent does not contend that petitioner, who received an advance to cover his meals of only about $5 a day, is required under section 274 to produce receipts for his meals to be entitled to a deduction under section 162

(a)(2) if he is able otherwise to establish the number of days he was away from home overnight.

Petitioner was given an advance for meals while on active duty. The 200 nights he spent away from home were most of the days he was on active duty, except for the period January to March 9, 1970, when he was assigned to a radar team on the New Jersey Turnpike and slept at his home in Linden, and for a period from May 7 through June 28, 1970, when he was screening applicants and worked from his home, the total of the two periods being approximately 4 months. Petitioner spent two-thirds of his active duty period away from home and is therefore entitled to deduct two-thirds of the $1,704 meal allowance to which he was entitled as a state trooper in New Jersey, making a total deduction for meals while away from home for the year of $1,136.

Reviewed by the Court.

Decision will be entered under Rule 155.

WILBUR, *J.*, concurring: While I concur with the majority, I add a few additional thoughts concerning the extraordinary contention that meals furnished by cash contributions of the employer are excludable from gross income *without regard to section 119*. This strikes me as demonstratively false for several reasons:

(1) Cash is more presumptively compensatory than in kind benefits. In permitting an exclusion for meals and lodging provided in kind, Congress required that the in kind benefits be provided; (a) on the business premises, (b) for the convenience of the employer, and (c) in the case of lodging, as a condition of employment. If these

benefits, when provided through cash payments to the employee can be excluded solely on the basis that they are noncompensatory, conditions (a) and (c) can be effectively eliminated from the statute. Since in determining whether the cash payment is compensatory the considerations invoked by the "convenience of the employer test" (regardless of what label we ascribe to the criterion) will be applied, the only condition of section 119 that would be applicable would be the convenience of the employer.

(2) This would mean that where lodging is provided very close to the business premises of the employer for the convenience of the employer the additional requirements of section 119 that the lodging be provided on the business premises as a condition of employment can be avoided by simply providing the equivalent of the rental payment to the employee in cash. The strict construction of the statute provided by *Charles N. Anderson*, 42 T.C. 410 (1964), revd. 371 F. 2d 59 (6th Cir. 1966) [1] can easily be circumvented.

(3) Even those courts that have liberally construed section 119 [2] to encompass cash payments nevertheless recognize that Congress in any event predicated the exclusion on *all* of the conditions contained in section 119 being met. We, of course, have held that the benefits of the exclusion provided by section 119 are not available in the case

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[1] See also *Jack Lindeman*, 60 T.C. 609 (1973). (See concurring opinion of J. Tannenwald at 617.)

[2] *United States v. Barrett*, 321 F. 2d 911 (5th Cir. 1963), affg. 205 F. Supp. 307 (S.D. Miss. 1962); *United States v. Morelan*, 356 F. 2d 199 (8th Cir. 1966), affg. 237 F. Supp. 879 (D. Minn. 1965); *United States v. Keeton*, 383 F. 2d 429 (10th Cir. 1967), affg. 256 F. Supp. 576 (D. Colo. 1966).

of cash payments. (*Burl J. Ghastin*, 60 T.C. 264 (1973)). It would be anomalous in the extreme to adhere to this position and nevertheless conclude that an exclusion for cash payments is permissible without regard to section 119 if they are for the convenience of the employer (however differently a criterion invoking the same considerations may be phrased) and therefore noncompensatory.

(4) It would be an extraordinary interpretation of the statute to permit cash payments for meals and lodging to be excluded under conditions more favorable than that provided for in kind benefits under section 119. Additionally, the enactment and repeal of section 120, which dealt specifically with subsistence payments for meals and lodging would be completely ignored by such interpretation.[3]

QUEALY, *J.*, agrees with this concurring opinion.

DRENNEN, *J.*, concurring and dissenting: I agree with the majority that *Jack E. Golsen*, 54 T.C. 742, does not require us to follow the conclusion of the Third Circuit in *Saunders v. Commissioner*, 215 F. 2d 768, for the reasons stated in the majority opinion. I also agree with the majority that the meal allowance must be included in petitioner's income and is not excludible under section 119 of the Code. Section

[3] Sec. 120, I.R.C. 1954; H. Rept. No. 1337, to accompany H.R. 8300 (Pub. L. No. 591), 83d Cong., 2 Sess. 19, A39-40 (1954); S. Rept. No. 1622, to accompany H.R. 8300 (Pub. L. No. 591, 83d Cong., 2d Sess. 19, 191 (1954); Technical Amendments Act of 1958 Pub. L. 85-866, 72 Stat. 1607; H. Rept. No. 775, 85th Cong., 1st Sess. (1957), 1958-3 C.B. 817; S. Rept. No. 1983, 85th Cong., 2d Sess. (1958), 1958-3 C.B. 935-36; Conf. Rept. No. 2632, 85th Cong., 2d Sess. (1958), 1958-3 C.B. 1205.

119 is clearly concerned with "meals in kind," which these are not; the legislative history mandates such a conclusion. And, as stated in section 61(a) and recognized in *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, and *Commissioner v. LoBue*, 351 U.S. 243, gross income means all income from whatever source derived. Here petitioner had complete, unfettered discretion as to how the allowance would be used. Under these circumstances I do not believe it makes any difference whether the amount paid to petitioner was intended as additional compensation or was made to in some way accommodate the employer. It is taxable income under section 61 unless specifically excluded under some other provision in the Code.

But I respectfully disagree with the majority in its conclusion that the cost of petitioner's meals are deductible only to the extent that they are eaten while away from home overnight, under section 162(a)(2). In my opinion petitioner's cost of meals eaten while on active duty under circumstances which made him subject to call at all times should be considered ordinary and necessary expenses of his business of being a State trooper, deductible under section 162(a) to the extent he can substantiate the expenditures for that purpose. In other words I would not consider these to be travel expenses, but rather to be ordinary and necesary expenditures required as a part of petitioner's duties, for the convenience of his employer.

"Over the years we have held on more than one occasion that a taxpayer may be in the trade or business of being an employee." *David J. Primuth*, 54 T.C. 374, 377 (1970). Thus, I conclude that petitioner's status as a New Jersey State trooper rose to the dignity of being a trade or busi-

ness. In addition, I do not perceive the problem presented here to be whether petitioner's meal expenses may be characterized as "ordinary and necessary" within the meaning of section 162(a). I assume that the expenses were "necessary" in the sense of being "appropriate and helpful," and that they were "ordinary" in the context of "life in all its fulness," *Welch v. Helvering*, 290 U.S. 111, 113, 114-5 (1933).

The inquiry here is whether sufficient nexus existed between these expenses and the "carrying on" of petitioner's trade or business to qualify them for deduction under section 162(a), or whether they were in essence personal or living expenses and nondeductible by virtue of section 262, cf. *Louis Drill*, 8 T.C. 902 (1947). I consider the expenses to have a dual character, partly business and partly personal, and their tax treatment depends upon which aspect outweighs the other. Cf. *George A. Papineau*, 16 T.C. 130, 131 (1951).

I think it is clear that the circumstances under which petitioner was required to take his meals were established for a substantial noncompensatory business reason of the employer in order to have petitioner and other State troopers available for emergency call during the meal period. It is equally clear from the record that emergencies were reasonably expected to occur, and actually did occur, which required petitioner to perform his job during his meal period. In addition the record indicates that a substantial motive of petitioner's employer in regulating its employees' meals was to reduce markedly the amount of time its employees used for eating, so that the employees would have more time to devote to their duties.

In sum, under the narrow circumstances before us, I find that petitioner has made a sufficient showing of business necessity for eating his meals on the job to take his expenses therefor out of the ambit of section 262 and to qualify them for a deduction under section 162(a). As said in *Arthur Benaglia*, 36 B.T.A. 838 (1937), the meals were not eaten on the job for petitioner's "personal convenience, comfort, or pleasure, but solely because he could not otherwise perform the services required of him." I find that the eating of his meals while on duty and at the site of his duty was a necessary and required part of this petitioner's business and the cost of those meals was an ordinary and necessary expense of his business. The fact that personal needs of petitioner were also satisfied was an incident of his business. Cf. *Gunnar Van Rosen*, 17 T.C. 834, 838 (1951).

I believe the allowance of deductions to employees of amounts they can prove were spent for meals taken, of necessity, on the job is more compatible with the structure of our taxing system than the exclusion from income of the entire allowance received for subsistence. This finds support in section 62(2)(A) of the 1954 Code which, in defining "adjusted gross income," permits an employee to deduct from gross income the deductions allowed by part VI (which includes section 162(a)) "which consist of expenses paid or incurred by the taxpayer, in connection with the performance by him of services as an employee, under a reimbursement or other expense allowance arrangement with his employer."

I recognize that my conclusion may be inconsistent with the conclusions of this Court on this point in *Charles H.*

Hyslope, 21 T.C. 131 (1953), and *Robert H. Saunders*, 21 T.C. 630, reversed by the Third Circuit *supra*. However, I think there have been enough changes in the approach to the deductibility of employee expenses since those cases were decided to justify taking another look at the application of our conclusions to the particular factual situation here involved.

STERRETT, *J.*, dissenting: It has long been recognized by Congress that all amounts paid by an employer to, or on behalf of, an employee are not includible in the gross income of the employee. Secs. 101, 105, 106, 107, 112, 113, 117 and 119. Such specific exclusions are not exhaustive. *Rudolph v. United States*, 370 U.S. 269, 274 (1962).

The courts have long agreed that everything of value received by an employee from his employer does not represent income. *Jones v. United States*, 60 Ct. Cl. 552 (1925) (quarters allowance for Army officer); *Bercaw v. Commissioner*, 165 F. 2d 521 (4th Cir. 1948) (quarters allowance for Army officer); *Saunders v. Commissioner*, 215 F. 2d 768 (3rd Cir. 1954) (meal allowance for state police); *Diamond v. Sturr*, 221 F. 2d 264 (2nd Cir. 1955) (food and lodging to employee while on duty at mental institution); *United States v. Barrett*, 321 F. 2d 911 (5th Cir. 1963) (meal allowance for state trooper); *United States v. Gotcher*, 401 F. 2d 118 (5th Cir. 1968) (expense paid trip to Germany); *Arthur Benaglia*, 36 B.T.A. 838 (1937) (meal and lodging for hotel manager); *John E. Cavanagh*, 36 T.C. 300 (1961) (reimbursement for food and lodging incurred because of move).

It is worth noting that all of the above cases reach the identical conclusion, that the item of value did not represent income to the recipient, based upon an analysis of section 61, or its predecessor section 22(a) of the 1939 Code, and *not* upon any specific exclusionary provision. It is also worth noting that, while some of the cases cited above involve payment in kind and some payment in cash, the form of payment is not controlling. Any distinction based upon this distinction was rejected by the *Saunders* case:

> • • • Admittedly, the payment of cash to an employee is normally compensatory and probably more obviously so than a payment in kind. Nevertheless, just as an employee is often furnished tangible property which cannot be regarded as compensation, an employee may be furnished cash which is not compensation. [215 F. 2d at 771]

The respondent himself, as early as his Regulations 45 which were in effect in 1920, ruled in Article 33 thereof that living quarters furnished an employee for the convenience of the employer did not represent income. During this period the revenue service had held that in varying situations amounts furnished to employees in cash or in kind need not be included in their respective gross incomes.[1]

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[1] See O.D. 11, 1 C.B. 66 (1919). An American Red Cross volunteer receiving maintenance should report as income only the excess, if any of the maintenance allowance over actual living expenses; O.D. 265, 1 C.B. 71 (1919). "Board and lodging furnished seamen in addition to their cash compensation is • • • supplied for the convenience of the employer and [its] value • • • is not required to be reported in such employees' income tax returns."; O.D. 514, 2 C.B. 90 (1920). "Supper money" paid to an employee who performs extra labor after regular business hours for the convenience of the employer does not represent additional taxable income.

In 1940 the regulations promulgated earlier were amended in relevant part to read as follows:

> If a person receives as compensation for services rendered a salary and in addition thereto living quarters or meals, the value to such a person of the quarters and meals so furnished constitutes income subject to tax. If, however, living quarters or meals are furnished to employees for the convenience of the employer, the value thereof need not be computed and added to the compensation otherwise received by the employees. [T.C. 4965, 1940-1 C.B. 13, 14]

This regulation was interpreted by the respondent in later publications in which he explained that the "convenience of the employer" rule should not be applied in those situations in which it is evident from the other circumstances that the receipt of the quarters and meals represented additional compensation, and that the rule would be met if they were required to be accepted by an employee so that he could properly perform his duties. Mim. 5023, 1940-1 C.B. 14, Mim. 6472, 1950-1 C.B. 15.

The common theme, the rationale for all the foregoing exclusions is that amounts paid to an employee for the convenience of the employer and not intended to be compensatory are not includible in income. For this cause of action to come within this framework we believe the determination that must be made is whether the meal allowance was furnished to the petitioner for his services or whether it was furnished to him so that he would eat in the manner prescribed. See *Jones, supra,* at 570. If after a review of the evidence in the record, the latter determination prevails the amounts furnished should not be included in gross income.

The court in *Saunders* was faced with facts, as the majority has noted, "not substantially different from those involved in the instant case". Using language from respondent's own explanation of the regulations is said:[2]

> Since it is not "evident" to us that the rations allowance was furnished as compensation, we should next determine, as indicated by Mimeo 5023, whether *Saunders* was "required to accept such * * * meals in order to perform properly his duties" and thus whether the rations allowance was furnished for the convenience of the employer so as not to be taxable. * * * [215 F. 2d at p. 774]

The court then went on to find that the meal allowance was so furnished and excluded it from gross income.

It is a historical fact that New Jersey provided its troopers with meals before switching to the meal allowance program. This decision was based on the hard realities of economics and efficiency. The majority opinion has made a finding of fact that "The meal allowance was not intended to represent additional compensation",[3] leaving as the sole determining factor whether the meal allowance was paid to the petitioner for the convenience of the employer.

Police are engaged in a unique occupation, one that deals with public safety—a line of work that by its very nature

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[2] See also the Fifth Circuit's statement in *Barrett, supra.* 321 F. 2d at 913:

> We find ourselves in accord with *Saunders*: the "convenience of the employer" test is the key criterion in determining whether or not payments are income. * * *

[3] In this connection compare *Stephen L. Zolnay*, 49 T.C. 389. 396 (1968), where in the context of the exclusion for scholarship authorized by sec. 117 the issue was stated "Was the taxpayer paid to work or paid to study?"

breeds emergencies at any time of day or night. The interests of the employer, the state, in furtherance of its responsibility for the public safety, demand that it require its troopers to eat when, where and for a duration that does not jeopardize the employer's responsibility to the public. The state adopted the meal allowance system to assist it in carrying out this responsibility. Surely this decision is within the employer's prerogative. See also *United States v. Keeton,* 256 F. Supp. 576, 580 (1966), affirmed per curiam 383 F. 2d 429 (10th Cir. 1967), Income Tax Regs. section 1.119-1(a)(2)(ii)(C).

It is difficult to conceive of a situation where an employee must so clearly take his meals at the convenience of the employer. This conclusion with respect to the convenience of the employer is supported by the discussions in *Barrett v. United States, supra; United States v. Morelan,* 356 F. 2d 199 (8th Cir. 1966); *United States v. Keeton, supra;* and *Tony M. Smith,* — F. Supp. — (D. Ct. Miss 1974), on appeal 5th Cir., each in the context of meal allowances for state troopers. See also Regs. section 1.119-1 (a)(2).

Turning now to a few brief comments on the majority opinion, the citation by the Third Circuit of its *Saunders* decision in *Jacob v. United States,* 493 F. 2d 1294, 1297 (3rd Cir. 1974) with specific reference to the convenience of the employer doctrine seems to us to be a clear reaffirmation of that doctrine long after the enactment of section 119. The Third Circuit clearly implied that the test survived the enactment of the 1954 Code. I also do not understand how the majority can construe the language [4] in the Committee reports dealing with the prospective section 119 as meaning "that the only exclusion for meals and lodging intended by Congress to be available to any taxpayer other than members of the Armed Forces after the enactment of the 1954 Code were meals and lodging excludable under the provisions of section 119." After all there always have been more employers in the United States whose convenience must be served than the military services.

In conclusion, petitioner has received a cash allowance in lieu of meals previously provided by the state. Petitioner has shown that it was not compensatory, was required to be received primarily for the benefit of his employer so that he could properly perform his duties, and additionally that it was spent for the purpose paid. As such we believe the determination must be made in petitioner's favor. I would not include the cash meal allowance in petitioner's gross income.

FORRESTER, TANNENWALD, GOFFE, HALL, and WILES, *JJ.*, agree with this dissent.

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[4] "* * * Therefore, any cash allowance for meals or lodging received by an employee will continue to be includible in gross income, as under existing law, to the extent that such allowance constitute compensation. [H. Rept. No. 1337, 83d Cong. 2d Sess. (1954), to accompany H.R. 8300]

APPENDIX B

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 76-1312

ROBERT J. KOWALSKI and NANCY A. KOWALSKI,
Appellants.

v.

COMMISSIONER OF INTERNAL REVENUE

ON APPEAL FROM THE UNITED STATES TAX COURT
(Tax Court Docket No. 112-73)

Argued October 22, 1976
Before: ALDISERT and GIBBONS, *Circuit Judges*, and McGLYNN, *District Judge* *

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OPINION OF THE COURT

(Filed November 11, 1976)

PER CURIAM.

The central question for decision is whether amounts advanced to the taxpayer, a New Jersey State trooper, as a meal allowance may be excluded from his gross income. The United States Tax Court, in a split in banc decision, ruled in favor of the Commisioner. The taxpayer has appealed. We reverse.

The precise issue, albeit presented prior to 1954 when section 119 [1] was added to the Code, was decided by us in *Saunders v. Commissioner*, 215 F.2d 768 (3rd Cir. 1954), in which we ruled in favor of the New Jersey State troopers and reversed 21 T.C. 630 (1954). Although not presenting

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* Joseph L. McGlynn, Jr., of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

1. 26 U.S.C. §119. *Meals or lodging furnished for the convenience of the employer*

There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him by his employer for the convenience of the employer, but only if—

(1) in the case of meals, the meals are furnished on the business premises of the employer, or

(2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.

In determining whether meals or lodging are furnished for the convenience of the employer, the provisions of an employment contract or of a State statute fixing terms of employment shall not be determinative of whether the meals or lodging are intended as compensation.

the precise issue, *Jacob v. United States,* 493 F.2d 1294 (3d Cir. 1974), gave continued vitality to the *Saunders* rationale. Speaking through Judge Van Dusen, in *Jacob* we said:

> Our position finds support in the so-called "state trooper" cases, in which courts have held that state troopers are entitled to exclude under § 119 the amount of cash allowances for meals taken at roadside restaurants. See United States v. Keeton, 383 F.2d 429 (10th Cir. 1967); United States v. Morelan, 356 F.2d 199 (8th Cir. 1966); United States v. Barrett, 321 F.2d 911 (5th Cir. 1963); Saunders v. Commissioner of Internal Revenue, 215 F.2d 768 (3d Cir. 1954);[6] but see Wilson v. United States, 412 F.2d 694 (1st Cir. 1969). While these cases are not exactly on point,[7] they nevertheless show that courts have focused primarily on the "convenience of the employer" test in determining whether an employee is entitled to an exclusion under § 119 and have construed the term "meals" broadly in order to give effect to the basic purpose and spirit of § 119.[8]

493 F.2d at 1297.

[6] *Saunders, supra,* involved facts arising prior to 1954 when § 119 was added to the Internal Revenue Code, but the reasoning of *Saunders* was followed in the above-cited post-1954 cases.

[7] In the "state trooper" cases, the courts have focused principally on the meaning of the provision in Treasury Regulation § 1.119-1(c)(2) that "the exclusion provided by section 119 applies only to meals and lodging furnished in kind by an employer to his employee." Despite this "in-kind" language, the courts have held that cash allowances for meals are excludable from the state troopers' income. The Commissioner argues that this "in-kind" language nevertheless precludes a conclusion in the instant case that groceries can constitute meals. We disagree. If the furnishing of cash allowances is properly excludable under § 119, then the furnishing of groceries, under the facts of this case, should be excludable also.

[8] In *Saunders, supra,* this court stated, in considering the principles which had evolved prior to the enactment of § 119, that "the rationale of the rule should make it applicable to determine the extent of gross income either when . . . meals are furnished in kind or cash is paid in lieu thereof." 215 F.2d at 771. The court also stated that the convenience of the employer was the key criterion in determining whether the cash allowances were excludable *Id.* at 772.

We have not been persuaded to depart from the position taken by this court from 1954 to 1974. We adhere to our reasoning in *Saunders* and *Jacob* and align ourselves with the Fifth, Eighth, and Tenth Circuits.

Accordingly, and for the reasons set forth in the dissenting opinion of Judge Sterrett in *Kowalski v. Commissioner,* 65 T.C. 44 (1975),[2] we will reverse the decision of the United States Tax Court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

(A.O.—U.S. Courts, International Printing Co., Phila., Pa.)

[2] Five other judges of the United States Tax Court agreed with Judge Sterrett's dissenting opinion.

APPENDIX C

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 76-1312

ROBERT J. KOWALSKI and NANCY A. KOWALSKI,
Appellants

v.

COMMISSIONER OF INTERNAL REVENUE

(Tax Court Docket No. 112-73)

ON APPEAL FROM A DECISION OF THE UNITED STATES TAX COURT

Present: ALDISERT and GIBBONS, *Circuit Judges* and McGLYNN, *District Judge* *

JUDGMENT

This cause came on to be heard on the record from the United States Tax Court, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Tax Court in this cause be, and the same is hereby reversed. Costs taxed against the appellee.

Attest:

s/ M. ELIZABETH FERGUSON
Chief Deputy Clerk

November 11, 1976

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* Joseph L. McGlynn, Jr., of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

APPENDIX D

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 61. GROSS INCOME DEFINED.

(a) General definition.—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;

(2) Gross income derived from business;

(3) Gains derived from dealings in property;

(4) Interest;

(5) Rents;

(6) Royalties;

(7) Dividends;

(8) Alimony and separate maintenance payments;

(9) Annuities;

(10) Income from life insurance and endowment contracts;

(11) Pensions;

(12) Income from discharge of indebtedness;

(13) Distributive share of partnership gross income;

(14) Income in respect of a decedent; and

(15) Income from an interest in an estate or trust.

SEC. 119. MEALS OR LODGING FURNISHED FOR THE CONVENIENCE OF THE EMPLOYER.

There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him

by his employer for the convenience of the employer, but only if—

(1) in the case of meals, the meals are furnished on the business premises of the employer, or

(2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.

In determining whether meals or lodging are furnished for the convenience of the employer, the provisions of an employment contract or of a State statute fixing terms of employment shall not be determinative of whether the meals or lodging are intended as compensation.

Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.):

§ 1.119-1 Meals and lodging furnished for the convenience of the employer.

•

(a) *Meals*—(1) *In general.* The value of meals furnished to an employee by his employer shall be excluded from the employee's gross income if two tests are met: (i) The meals are furnished on the business premises of the employer, and (ii) the meals are furnished for the convenience of the employer. The question of whether meals are furnished for the convenience of the employer is one of fact to be determined by analysis of all the facts and circumstances in each case. If the tests described in subdivisions (i) and (ii) of this subparagraph are met, the exclusion shall apply irrespective of whether under an employment contract or a statute fixing the terms of employment such meals are furnished as compensation.

(2) *Meals furnished without a charge.* (i) Meals furnished by an employer without charge to the employee will be regarded as furnished for the convenience of

the employer if such meals are furnished for a substantial noncompensatory business reason of the employer. If an employer furnishes meals as a means of providing additional compensation to his employee (and not for a substantial noncompensatory business reason of the employer), the meals so furnished will not be regarded as furnished for the convenience of the employer. Conversely, if the employer furnishes meals to his employee for a substantial noncompensatory business reason, the meals so furnished will be regarded as furnished for the convenience of the employer, even though such meals are also furnished for a compensatory reason. • • •

(ii) (*a*) Meals will be regarded as furnished for a substantial noncompensatory business reason of the employer when the meals are furnished to the employee during his working hours to have the employee available for emergency call during his meal period. In order to demonstrate that meals are furnished to the employee to have the employee available for emergency call during the meal period, it must be shown that emergencies have actually occurred, or can reasonably be expected to occur, in the employer's business which have resulted, or will result, in the employer calling on the employee to perform his job during his meal period.

• • • • •

(*c*) Meals will be regarded as furnished for a substantial noncompensatory business reason of the employer when the meals are furnished to the employee during his working hours because the employee could not otherwise secure proper meals within a reasonable meal period. For example, meals may qualify under this subdivision (*c*) when there are insufficient eating facilities in the vicinity of the employer's premises.

• • • • •

(iii) Meals will be regarded as furnished for a compensatory business reason of the employer when the meals are furnished to the employee to promote the morale or goodwill of the employee, or to attract prospective employees.

• • • • •

(c) *Rules.* (1) For purposes of this section, the term "business premises of the employer" generally means the place of employment of the employee. For example, meals and lodging furnished in the employer's home to a domestic servant would constitute meals and lodging furnished on the business premises of the employer. Similarly, meals furnished to cowhands while herding their employer's cattle on leased land would be regarded as furnished on the business premises of the employer.

(2) The exclusion provided by section 119 applies only to meals and lodging furnished in kind by an employer to his employee. If the employee has an option to receive additional compensation in lieu of meals or lodging in kind, the value of such meals and lodging is not excluded from gross income. However, the mere fact that an employee, at his option, may decline to accept meals tendered in kind will not of itself require inclusion of the value thereof in gross income. Cash allowances for meals or lodging received by an employee are includible in gross income to the extent that such allowances constitute compensation.

(d) *Examples.* The provisions of section 119 may be illustrated by the following examples:

• • • • •

Example (5). A Civil Service employee of a State is employed at an institution and is required by his employer to be available for duty at all times. The employer furnishes the employee with meals and lodging at the institution without charge. Under the applicable State statute, his meals and lodging are regarded as part of the employee's compensation. The employee would nevertheless be entitled to exclude the value of such meals and lodging from his gross income.

• • • • •

Example (8). A manufacturing company provides a cafeteria on its premises at which its employees can purchase their lunch. There is no other eating facility located near the company's premises, but the employee can furnish his own meal by bringing his lunch. The amount of compensation which any employee is required to include in gross income is not reduced by the amount charged for the meals, and the meals are not considered to be furnished for the convenience of the employer.

Example (9). A hospital maintains a cafeteria on its premises where all of its 230 employees may obtain a meal during their working hours. No charge is made for these meals. The hospital furnishes such meals in order to have each of 210 of the employees available for any emergencies that may occur, and it is shown that each such employee is at times called upon to perform services during his meal period. Although the hospital does not require such employees to remain on the premises during meal periods, they rarely leave the hospital during their meal period. Since the hospital furnishes meals to each of substantially all of its employees in order to have each of them available for emergency call during his meal period, all of the hospital employees who obtain their meals in the hospital cafeteria may exclude from their gross income the value of such meals.